80-396
No. 80-133

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in their Official Capacity as
Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

v.

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

GUY J. WELLS
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& GNYS, INC.
410 Turks Head Building
Providence, Rhode Island 02903
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Counsel for Petitioners

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DECOF & GRIMM
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(401) 272-1110
Counsel for Respondents

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1980
CERTIORARI GRANTED DECEMBER 15, 1980

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GENERAL DOCKET

United States Court of Appeals
For the First Circuit

Case No. 79-1397

FACT CONCERTS, INC., ET AL.

v.

THE CITY OF NEWPORT, ET AL.

DOCKET ENTRIES

1979		FILINGS—PROCEEDINGS
Aug.	13	Copy of district court docket entries and notice of appeal received and filed and case docketed.
Aug.	13	Record on appeal received and filed. Notices sent.
Aug.	17	Motion filed. Order (Coffin, Ch.J.) Upon motion of appellants in case number 79-1397 and the representation that the transcript will not be completed until October 10, 1979, it is ordered that the time for filing the statement of issues and designation be enlarged to October 22, 1979 and the time for filing the briefs and appendix be enlarged to November 21, 1979. Notices mailed.
Aug.	20	Appearance of Guy J. Wells, Esquire for appellant received and filed.
Aug.	30	Appearance of Leonard Decof, Esquire for appellee received and filed.
Oct.	19	Motion filed. Order (Bownes, J.) enlarging time for filing statement and designation to November 19, 1979, and enlarging time for filing appendix and brief for appellants to December 20, 1979. Notices mailed. [gvc]
Nov.	15	Supplemental record on appeal received and filed. (mn)
Nov.	16	Supplemental certificate consisting of two volumes of transcripts received and filed [jc]

1979 FILINGS—PROCEEDINGS

Nov. 19 Appellants' designation of contents of appendix and their statement of issues received and filed. (mn)

Dec. 3 Appellees' counterdesignation of contents of appendix received and filed.

Dec. 20 Brief for appellents and appendix (3 Vols.) and Exhibits received and filed. Notices mailed. (mn)

Dec. 21 Motion filed. Order (Campbell, J.) enlarging the time for appellees to file their brief to and including January 24, 1980. Notices mailed. [jc]

1980 FILINGS—PROCEEDINGS

Jan. 24 Brief for appellee received and filed. (mn)

Jan. 25 Assigned for hearing at the February, 1980 session in Boston. [jc]

Feb. 1 Heard before Coffin, Ch.J., Campbell & Bownes, J.J. [jc]

Feb. 6 Supplement to Defendant-Appellants brief received and filed. (cb)

Feb. 6 Appellees' supplemental memorandum received and filed. (mn)

June 17 JUDGMENT: The judgment of the district court is affirmed. Opinion of the Court by Bownes, Circuit Judge. Notices mailed. [jc]

July 8 Mandate issued, copy filed. Taxation filed. Original papers returned to the district court. Notices mailed. 'jc]

Sept. 22 Notice of filing petition for certiorari (80-396) September 12, 1980.

Dec. 18 Order of Supreme Court granting certiorari (80-396) Dec. 15, 1980. [lam]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

DOCKET ENTRIES

1976		PROCEEDINGS
Mar.	1	Complaint filed with appearance of Leonard Decof, Esq. Summons issued returnable within 20 days after service. F.
	5	9 Summonses returned duly served and filed. /i
	24	Appearance of James S. O'Brien, City Solicitor and Frederick W. Faerber, Jr., Assistant City Solicitor for Deft's filed. (j)
		Deft's Motion to Dismiss filed together with affidavit of Robert A. Shea.
Apr.	16	Pltff's, Facts Concert, Inc. & Marvin Lerman objection to motion to dismiss filed.
Apr.	24	Order re: Regrettably the Mot to Dismiss has been pending an inordinate amount of time due to the unfortunate delay in appointing a judge to fill a vacancy that existed. The Court does not wish counsel to conclude the matter is now being treated summarily in order to expedite a ruling and not have further delays attendant the preparation of the opinion, it suffices to say, full study has been given to the memo filed. I conclude the mot to dismiss must be denied and entered and filed. h
May	8	Defts' Answer filed. kml
June	21	Preliminary pretrial Order—discovery closed by November 1, 1978 on and after November 6, 1978. l
Nov.	3	Notice to take deposition of Edward Coristine. h
	3	Notice to take deposition of John West.
	3	Notice to take deposition of Humphrey J. Donnelly, III. h

1976 PROCEEDINGS

Nov. 7 Pltff's motion for ext. of time to Nov. 13 to file pretrial memo.
7 3 deposition subpoenas returned.
7 Pltffs' amended notice to take deposition of John H. West. l
8 Motion for extension of time to file pretrial memo is granted to Nov. 13, 1978.
Nov. 13 Pltff's Motion for extension of time for filing pretrial memo to Nov. 17, 1978. h
16 Notice to take deposition of Lawrence E. Newsome. h
16 Notice to take deposition of Rayumond H. Carr. h
16 Notice to take deposition of James F. Ring. h
16 Notice to take deposition of Robert O. Beattie. h
17 Pltff's motion for an amended complaint. l
20 Pltff's pretrial memo received. l
29 Pltffs' Motion to amend complaint, no objection having been timely filed is granted. h
29 Pltffs' Amended complaint. h
30 Amended notice to take deposition of Robert O. Beattie. h
30 Amended notice to take deposition of James F. Ring. h
30 Amended Notice to take deposition of Raymond H. Carr. h
30 Amended Notice to take deposition of Lawrence E. Newsome. h
30 Amended notice to take deposition of John H. West. h
Dec. 13 Defts' answer to amended complaint. l
Dec. 15 Defts' pretrial memo received and brought into chambers. l

1979		PROCEEDINGS
Jan.	9	JURY IMPANELLED. L
	10	Pltffs' notice to take deposition of Richard Zimmer. 1
	16	1ST DAY OF TRIAL—Marvin Lerman sworn; Pltff exhibits 1-17. 1
	17	2 civil subpoenas returned. 1
Jan.	17	2nd day of trial—Richard Zimmer, Dennis J Murphy sworn; Pltff exhibits 19, 20, 18. 1
	18	3rd day of trial—Frank N. Amada, Albert Costa, Mayor Humphrey J. Donnelly sworn—Pltff. exhibits 21-24. 1
	22	4th day of trial—Jarcho, John H. West, Seymour Ladd sworn; exhibits 25-26. 1
	23	5th day of trial—Chief of Police Perry sworn and John West recalled. Deft's exhibit A. 1
	24	6th day of trial—John West resumes stand, Edward Coristein, Raymond H. Carr, James P. Ring, Lawrence E. Newsome sworn—Deft Exhibit B. Deft rests. Deft's motion for directed verdict is denied (oral motion) Deft's motion to dismiss pltff Lerman from action. Judge reserves ruling until morning.
	25	7th day of trial—Final arguments, charge to the jury; verdict returned for the pltffs. 1
	25	VERDICT SHEET FILED—Total compensatory damage—$72,910.00; Total punitive damages—$200,000.00. 1
	26	Judgment entered. 1
	30	Defts' Motion for a new trial. h
	31	Order re: Defts are exempted from compliance with local Rule 12(a)(11) requiring filing of memo with motion for a new trial. Defts and pltff shall file memos in accordance with a stip. to be filed not later than Feb. 5, 1979.

1979 PROCEEDINGS

Feb. 5 Objection of Pltffs to motion for new trial. h
5 Pltffs' Motion for extension of time for filing their bill of costs. h
5 Defts' Motion for judgment NOV or in the alternative for a new trial. h
5 Enter the appearance of Guy J. Wells. h
14 Objection to Motion for nov or in the alternative for a new trial. h
15 Stipulation re: Pltffs and Defts hereby stipulate that dfts' memo of law in support of its mots for new trial and judgment N.O.V. will be submitted on or before Mar. 1, 1979 and pltffs' reply Mar. 15, 1979 entered. h
21 Pltffs' Motion for extension of time for filing bill of costs until decision rendered on any appeal which may result is granted. h

ar. 1 Stipulation re: Defts have to March 9 in which to file its memo in support of motion for new trial and judgment n.o.v. pltffs have 2 weeks thereafter to file their memo in opposition. 1

Mar. 23 Pltffs' motion for ext. of time is grantdd; pltffs will have up to and inluding April 4 to file their memo in opposition to defts' motions for judgment n.o.v. and new trial. 1

July 2 Opinion and Order re: A remittitur or a new trial on damages must ordered; Considering the punitive sums awarded against the other individuals in this case, $75,000. appears the maximum permissible punitive award for the city; the pltff is free to accept or reject this remittitur sum; if the remittitur is rejected, the motion for new trial on damages will be granted; the pltffs will advise the Court of its decision. 1

1979		PROCEEDINGS
July	9	Remittitur re Pltffs' accept the remittitur ordered by the court on page 14 of Opinion and Order of July 2, 1979 reducing that portion of punitive damages from $200,000. to $75,000.00. 1
	17	Appearance of Joseph Macioci for Defts filed.
	18	Judgment entered in accordance with the verdict sheet as modified by the remi filed by pltff on July 9, 1979 entered. h
	18	Notice of appeal to the United States Court of Appeals for the First Circuit.
	18	Bond for appeal.
	18	Motion for relief from the provisions of local rule 37.h
Aug.	1	Pltff's notice of cross-appeal from Opinion and order entered July 2, 1979. 1
	2	Pltff's bond for costs on appeal.h ($5.00 filing fee paid Receipt 2133)
	2	
	2	
	7	Remainder of Appellate Filing Fee of $50.00 pd, Receipt #2171/ca
	7	Certified copy of docket sheet sent to Court of Appeals./cah
Aug.	8	Defts' Motion for relief from the Provisions of Local Rule 37 is passed by a of counsel entered. h
Aug.	10	Clerk's certificate.
	10	Case forwarded to First Circuit Court. h

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

COMPLAINT

JURISDICTION

1. This action arises under the Due Process clause of the United States Constitution, and under 42 USC, 1981, 1983 and 1985. Jurisdiction is properly vested in this Court pursuant to the provisions of 28 USC, 1331 and 1343(3).

2. Jurisdiction over Counts II and III, is properly vested in this Court pursuant to the doctrine of Pendant Jurisdiction.

3. The amount in controversy exceeds Ten Thousand ($10,000) Dollars, exclusive of interest and costs.

PARTIES

4. Fact Concerts, Inc. is a Corporation organized under the laws of the State of Rhode Island for the purpose of promoting musical concerts.

Marvin Lerman is a citizen of the State of Rhode Island and at all times mentioned herein provided the financing for, and was the principal investor in a concert called "Jazz at Newport," held on August 30 and 31 of 1975, at Fort Adams, located in the City of Newport, State of Rhode Island.

5. Defendant, Humphrey J. Donnelly III is a citizen of the State of Rhode Island, and Mayor of Newport. The City of Newport is a municipal corporation located in the State of Rhode Island. Lawrence Newsome, John H. West, Robert O. Beattie, Raymond H. Carr, Edward K. Coristine and James F. Ring are citizens of the State of Rhode Island and at all times mentioned herein held positions as members of the City Council for the City of Newport. At all times mentioned herein, Defendants were engaged in a proprietary function of a governmental activity.

COUNT I

6. On or about August 22, 1975, Plaintiffs, Fact Concerts, Inc., Marvin Lerman and Defendants entered into a contract for the promotion and production of a musical concert on August 30 and 31, 1975, to be held at a facility known as "Fort Adams," property owned and operated by the State of Rhode Island. (A copy of said contract is attached hereto and is marked Exhibit "A").

7. Pursuant to, and in reasonable reliance upon their rights as in the aforementioned contract, Plaintiffs, Fact Concerts, Inc., and Marvin Lerman expended all necessary time, labor and energy and incurred great expenses in the negotiation and scheduling of performances and activities subsequent thereto to insure the success of the program.

8. On or about August 26, 1975, without any apparent provocation, the Defendants informed Plaintiffs of their intent to cancel said contract if a group known as "Blood, Sweat and Tears" remained on the program.

9. Plaintiffs acceded to the Defendants' demand, cancelled the appearance of "Blood, Sweat and Tears" and hired a substitute group known as "The Weather Report."

10. On or about August 29, 1975, Plaintiffs were advised by Defendants through their City Solicitor that the Defendants had changed their position and would allow "Blood, Sweat and Tears" on said program if the program would be limited to the playing of "jazz".

11. Plaintiffs thereupon proceeded to re-hire "Blood, Sweat and Tears" and cancel "The Weather Report" in reliance upon Defendants' representations.

12. Defendants then advised Plaintiffs that the Defendants again desired to reconsider their earlier decision, and thereafter informed Plaintiffs that the contract would be cancelled if "Blood, Sweat and Tears" remained on the program.

13. On or about August 29, 1975, Defendants advised Plain-

tiffs that they must sign a new contract wherein "Blood, Sweat and Tears" would not appear on said program which, because of their compliance with all material terms and conditions of said contract, Plaintiffs refused to do.

14. Plaintiffs, in reliance upon said contract, had sold thousands of tickets to patrons, had employed the services of performers, had arranged for all necessary and incidental services.

15. Defendants thereupon wrongfully and without authority proceeded to announce the cancellation of the concert called "Jazz at Newport" through the public media, including radio and television stations, newspaper media and the AP and UPI wire services.

16. Defendants have consistently maintained that their reluctance to allow "Blood, Sweat and Tears" to perform in said jazz program was premised exclusively upon the alleged facts that:

a) "Blood, Sweat and Tears" is a rock group so-called.

b) "Blood, Sweat and Tears" is, in fact, a group of young people with long hair, non-traditional values and otherwise allegedly undesirable attributes.

17. The conduct of the Defendants have amounted to an arbitrary, capricious and unlawful violation of the Fourteenth Amendment, due process rights. Thus, Defendants have unconstitutionally interferred with the contractual obligations existing or in force between Plaintiffs and the various jazz performing groups involved in said program.

Additionally, Defendants revoked Plaintiffs' license to hold said concert, which license had been granted pursuant to the aforementioned contract, without a prior hearing.

18. The Plaintiff's license was issued by Defendants pursuant to the provisions of Newport Ordinance No. 15-69 Sections 19-8 through 19-10 of the Newport City Code. Said Ordinance provides in pertinent part, as follows:

Section 19-8—"All persons, firms and corporations who

desire an entertainment license or dance license on an annual basis shall obtain the same by application to the City Council, which application would state the type of entertainment to be provided. The license fee for an annual entertainment or dance license shall be seventy-five dollars per year, payable in full when the license is issued. (Ord. No. 15-69, Sec. 1)".

19. Said Ordinance on its face is unduly vague, broad and without defined standards. Pursuant to the provisions of said Ordinance, the Defendants arbitrarily, capriciously and without any constitutional justification revoked Plaintiffs' license herein involved.

20. The Defendants, and each of them, engaged in a conspiracy to Deprive Plaintiffs of their constitutional rights as secured by the Due Process Clause of the Fourteenth Amendment by engaging in the aforementioned unconstitutional activities.

WHEREFORE, Plaintiffs demand judgment against Defendants in the amount of TWO HUNDRED FIFTY THOUSAND ($250,000.00) DOLLARS compensatory damages, and ONE MILLION ($1,000,000.00) DOLLARS punitive damages, plus interest, costs and attorney's fees.

MOREOVER, Plaintiffs seek a declaratory judgment that Newport Ordinance Sections 19-8 is, because of its vagueness and overbreadth, unconstitutional.

Plaintiffs further seek a preliminary and permanent injunction prohibiting the City Council for the City of Newport from denying licenses for similar performances in the future.

COUNT II

1. Paragraphs 6 through 17 of Count I are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. On or about August 29, 1975, Defendants wrongfully, intentionally, and maliciously interferred with Plaintiffs' right to earn potential profits through the promotion of the concert,

"Jazz at Newport," by making announcements through the public 'medias including radio, and television stations, newspapers, and news reporting wire services, that the concert was cancelled and that Plaintiffs' license had been revoked.

3. Said announcements were in fact false, and were made by Defendants without justification or authority, and for the sole purpose of maliciously injuring Plaintiffs in the promotion of the concert.

4. By reason of Defendants' interference with Plaintiffs' production of "Jazz at Newport", Plaintiffs' reputations with the theatrical community has been damaged, thus making it difficult to retain performers in the future, and their business reputation with the concert-going public has been defamed.

5. At all times mentioned herein, Plaintiffs duly performed all the conditions of said contract on their part, expended all necessary time, labor and energy and incurred great expenses toward the successful promotion of said concert.

6. As a direct result of Defendants' interference with the promotion of said concert, Plaintiffs have sustained great financial losses, lost revenues and profits from reduced ticket sales, and incidental revenue producing activities.

WHEREFORE, Plaintiffs, Fact Concerts, Inc., and Marvin Lerman, demand judgment against Defendants in the amount of damages, and ONE MILLION ($1,000,000.) DOLLARS in punitive damages, plus interest, costs and attorneys' fees.

COUNT III

1. Paragraphs 6 through 17 of Count I, and Paragraphs 2 through 5, of Count II are hereby incorporated by reference having the same force and effect as if set forth in full.

2. Defendants' activities toward Plaintiffs, as herein set forth by reference, constitute direct acts of harrassment aimed at interfering with and permanently damaging Plaintiffs in their endeavor to produce a successful concert production.

3. Defendants have further interferred with Plaintiffs'

obligation of contract toward the performing groups hired and have the effect of permanently damaging Plaintiffs' reputations in the theatrical community and in their ability to conduct successful future concerts.

4. As a direct result of Defendants' acts, Plaintiffs have sustained damage to their reputation in the theatrical community with the performing groups involved, and most significantly, with the concert-going public.

WHEREFORE, Plaintiffs, Fact Concerts, Inc., and Marvin Lerman, demand judgment against Defendants in the amount of TWO HUNDRED FIFTY THOUSAND ($250,000.00) DOLLARS compensatory damages, and ONE MILLION ($1,000,000.00) DOLLARS punitive damages plus interest, costs and attorney's fees.

By their Attorney:

s/ LEONARD DECOF
LEONARD DECOF, LTD.
111 Wayland Avenue
Providence, Rhode Island

Dated: February , 1976

Plaintiffs hereby claim
trial by jury.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

ANSWER

Now come the defendant in the above entitled action and file herewith their Answer as follows:

1. The defendants deny the allegations contained in Paragraphs 1 and 2 of the Complaint in that the statutes cited are inapplicable in the instant action.

2. The defendants are without sufficient knowledge to form a belief as to the matter alleged in Paragraph 3 of said Complaint and leave the plaintiffs to the proof thereof.

3. As to Paragraph 4 of said Complaint, the defendants admit that at the time of filing of said Complaint, Fact Concerts, Inc., was a corporation organized under the laws of the State of Rhode Island as alleged.

As to the plaintiff, Lerman, the defendants are without sufficient knowledge to form a belief as to the matters stated with respect to him, and leave the plaintiffs to the proof thereof.

4. The defendants admit the allegations of Paragraph 5 of said Complaint.

COUNT I

5. The defendants deny the allegations set forth in Paragraph 6 of said Complaint in that the plaintiff, Marvin Lerman, was not a party to the alleged contract and was, and is, unknown to the defendants; further, that said alleged contract was an ultra vires action of the defendants and the plaintiffs in that it purported to regulate the use of facilities at Fort Adams, located within the City of Newport, which is, and was, property of the State of Rhode Island over which the plantiffs had no jurisdiction or propriatorial interests.

6. The defendants deny the allegations set forth in Paragraphs 7, 8, 9, 10, 11, 12, and 13 of said Complaint.

7. The defendants are without sufficient knowledge to form a belief as to the matter alleged in Paragraph 14 of said Complaint and leave the plaintiffs to the proof thereof.

8. The defendants deny the allegations set forth in Paragraphs 15, 16, 17, 18, 19 and 20 of said Complaint.

COUNT II

1. The defendants reaffirm their answers to Paragraphs 1 through 17 of Count I of the Complaint herein, which answers

are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. The defendants deny the allegations set forth in Paragraphs 2, 3, 4, 5 and 6 of Count II of said Complaint.

COUNT III

1. The defendants reaffirm their answers to Count II of the Complaint herein, which answers are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. The defendants deny the allegations of Paragraphs 2, 3 and 4 of said Count III.

SECOND DEFENSE

The Complaint, in all Counts, fails to state a claim against the defendants upon which relief can be granted.

WHEREFORE, the defendants demand judgment against the said plaintiffs, jointly and severally, together with fees and costs incurred in the defense hereof and such other relief as this Honorable Court may deem just and proper.

By their Attorneys,

s/ JAMES S. O'BRIEN
JAMES S. O'BRIEN
City Solicitor
City Hall
Newport, Rhode Island 02840
Telephone: (401) 846-1297

s/ FREDERICK W. FAERBER, JR., Esq.
FREDERICK W. FAERBER, JR.
Assistant City Solititor
City Hall
Newport, Rhode Island 02840
Telephone: (401) 846-1297

Dated: May 1, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

MOTION TO DISMISS

The Defendants, City of Newport, Humphrey J. Donnelly III and Robert O. Beattie, said Humphrey J. Donnelly III in his capacity as Mayor of said City and a member of the Council of said City, and said Robert O. Beattie in his capacity as a member of said Council, pursuant to Rule 12 (b), Federal Rules of Civil Procedure, come now and move this Honorable Court as follows:

1. To dismiss the instant action because the Complaint fails to state a claim or claims upon which relief can be granted.

2. To dismiss said action on the grounds (a) that the Complaint fails to allege diversity of citizenship among the parties and, in fact, affirmatively identifies all parties named as persons having presence and/or citizenship in the State of Rhode Island; (b) the Plaintiff, Lerman, is a party unknown to the Defendants and is not a party to the Contract annexed to the Complaint as Exhibit "A"; indeed, he is identified solely as an "investor" in Plaintiff Fact Concerts, Inc., and as such is without standing to maintain this action; (c) the doctrine of pendent jurisdiction is inapplicable, the Plaintiff Fact Concerts, Inc., having previously initiated an action in the Superior Court of the State of Rhode Island, within and for the County of Newport, entitled Fact Concerts, Inc. v. City of Newport, et als," Docket Number C.A. 75-181, predicated essentially upon the same facts alleged herein and seeking relief essentially identical to that sought herein, which said action is still pending and in which said action partial relief has already been obtained, all as evidenced by Exhibit "A" attached hereto, and t Plaintiffs have wholly failed to meet

the requirements of General Laws of Rhode Island, 1956 (1979 Reenactment), as amended, Section 45-15-5, as evidenced by the affidavit of Robert A. Shea, City Clerk of the Defendant City as, evidenced by Exhibit "B" attached hereto.

3. To dismiss the action for insufficient service of process on the grounds that (1) although the City Solicitor of the Defendant City is authorized to act as agent for service of process said City and its elected officials, to wit, Defendants Donnelly and Beattie, in their official capacities, said Defendants are also sued herein individually, and neither has been personally served with process herein; likewise, the remaining named Defendants, Newsome, West, Carr, Coristine and are sued individually and have not been personally served with process herein, and purported service upon them through said City Solicitor is without effect.

Respectfully,

s/ JAMES S. O'BRIEN
City Solicitor
s/ FREDERICK W. FAERBER, JR.
Assistant City Solicitor
Attorneys for Defendants, City of Newport, Humphrey J. Donnelly III, in his capacity as Mayor of said City, and said Humphrey J. Donnelly III and Robert O. Beattie, in their capacities as members of the Council of said City.
City Hall—Broadway
Newport, Rhode Island 02840
Telephone 846-1297

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

OBJECTION TO MOTION TO DISMISS

The Plaintiffs, Facts Concerts, Inc. and Marvin Lerman object to Defendants' Motion to Dismiss their Complaint filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

1. Plaintiffs' Complaint, Count I, is properly brought under Sections 42 USC, 1983 and 1985, and under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Plaintiffs are seeking equitable relief in the form of an injunction against the enforceability of an unconstitutional City Ordinance.

2. Jurisdiction over Counts II and III, wherein Plaintiffs seek monetary damages for the wrongful interference with Plaintiffs' right to earn potential profits, and the tortuous interference with Plaintiffs' obligation of contract is vested in this Honorable Court by reason of the Doctrine of pendant jurisdiction.

3. Plaintiffs' right to prosecute this action without compliance with Sec. 45-15-5 of the Rhode Island General Laws is premised upon Defendants' prior denial of Plantiffs' claim and for the reason that Plaintiffs are seeking in part, equitable relief for which compliance with said statute is not required.

4. Plaintiffs' prior filing of a Complaint in the Newport Superior Court for a restraining order against the interference by the City of the scheduled concert is not a compelling reason for this Court's abstaining from taking jurisdiction of this matter. Plaintiffs need not exhaust a state remedy as a condition precedent to filing this action for the denial of a constitutionally protected right.

For the reasons discussed in the accompanying Memorandum of Points and Authorities, Defendants' Motion to Dismiss

under Rule 12(b) of the Federal Rules of Civil Procedure should be denied.

Respectfully submitted,
s/ PHILIP M. WEINSTEIN
PHILIP M. WEINSTEIN
Attorney for Plaintiffs
LEONARD DECOF, LTD.
111 Wayland Avenue
Providence, Rhode Island 02906

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

ORDER

Regrettably the Motion to Dismiss has been pending an inordinate amount of time due to the unfortunate delay in appointing a judge to fill a vacancy that existed. The Court does not wish counsel to conclude the matter is now being treated summarily. In order to expedite a ruling and not have further delays attendant the preparation of an opinion, it suffices to say, full study has been given to the memoranda filed. I conclude the motion to dismiss must be denied.

So Ordered.

By Order,

s/ MICHELE L HASTINGS
Deputy Clerk

Enter:

s/ Raymond J. Pettine
Chief Judge

April 24, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

AMENDED COMPLAINT

JURISDICTION

1. This action arises under the First and Fourteenth Amendments of the United States Constitution and under 42 U.S.C. §1983. Jurisdiction is properly vested in this Court by virtue of 28 U.S.C. §§1331 and 1343(3).

2. Jurisdiction over Counts III, IV and V is properly vested in this Court by virtue of the doctrine of pendant jurisdiction.

3. The amount in controversy exceeds the sum of Ten Thousand and 00/100 Dollars ($10,000.00), exclusive of interest and costs.

PARTIES

1. Plaintiff Fact Concerts, Inc. was at all times mentioned herein a corporation organized under the laws of the State of Rhode Island for the purpose of promoting musical concerts.

2. Plaintiff Marvin Lerman is a resident of the State of Rhode Island and at all times mentioned herein was engaged in a joint venture with Plaintiff Fact Concerts, Inc. to promote a musical concert at Fort Adams in the City of Newport on August 30 and 31, 1975.

3. Defendant City of Newport is a municipal corporation located in the State of Rhode Island.

4. Defendant Humphrey J. Donnelly is and was at all times mentioned herein the Mayor of the City of Newport.

5. Defendants Lawrence Newsome, John H. West, Robert O. Beattie, Raymond H. Carr, Edward K. Coristine and James F. Ring are citizens of the State of Rhode Island and at

all times mentioned herein were members of the City Council for the City of Newport.

COUNT I

1. On or about August 22, 1975, Plaintiffs sought and were granted a license by Defendant City of Newport, acting by and through its agent, Defendant Donnelly, to hold a concert on August 30 and 31, 1975, at Fort Adams in the City of Newport.

2. This license was granted pursuant to the provisions of §19-7 of the Newport City Code. Said Ordinance provided as follows:

> SECTION 19-7. All persons, firms and corporations desiring to hold a public entertainment event or a dance shall first obtain an entertainment or a dance license from the city council. Whenever an annual or daily dance license shall be issued by the city council, it shall be the duty of the chief of police to assign a police officer to such dance, unless the chief of police shall determine, based upon past experience, that the public safety does not require a police officer to be assigned. Upon receipt of an application for a dance license, the city clerk shall notify the chief of police, who shall investigate each application and notify the city clerk of those applications which do not require the assignment of a police officer.

3. Said Ordinance was amended on August 10, 1977 by Ordinance No. 24-77 and now provides as follows:

> SECTION 19-7. All persons, firms and corporations desiring to hold a public entertainment event or a dance shall first obtain an entertainment or dance license from the city council. Whenever an annual or daily dance license shall be issued by the city council, it shall be the duty of the chief of police to assign a police officer to such dance, unless the chief of police shall determine, based upon past experience, that the public safety does not re-

quire a police officer to be assigned. Upon receipt of an application for a dance license, the city clerk shall notify the chief of police, who shall investigate each application and notify the city clerk of those applications which do not require the assignment of a police officer.

In the event that such license or licenses are granted to a person, firm or corporation which is the licensed holder of an alcoholic beverage license, any license or licenses granted hereunder shall not permit such entertainment event or dance to extend for a period exceeding one half hour beyond the authorized closing time for the person, firm or corporation holding such alcoholic beverage license.

In all other instances where the entertainment events or dance licenses shall be issued the hours during which such events or dances may be held shall be as determined by said city council having due regard for public convenience, welfare, health and safety.

4. Said Ordinance is unconstitutionally vague and overbroad in that it provides no objective standards which govern the decision to grant or deny a license, nor has the city council promulgated guidelines outlining such standards.

5. Pursuant to the provisions of said Ordinance, the Defendants arbitrarily and capriciously revoked Plaintiffs' license to hold the concert scheduled for August 30 and 31, 1975.

6. Plaintiffs were forced to obtain a temporary restraining order in order to conduct their concert.

7. Plaintiff Fact Concerts, Inc. and/or Plaintiff Marvin Lerman desire to continue to promote concerts and public entertainment events in the City of Newport and said ordinance will be enforced with respect to such concerts and events.

WHEREFORE, Plaintiffs seek a declaratory judgment that Newport Ordinance §19-7 is unconstitutional. Plaintiffs fur-

ther seek a preliminary and permanent injunction prohibiting Defendant City of Newport and its agents and servants from attempting to enforce said ordinance and attorney's fees as provided in 42 U.S.C. §1988.

COUNT II

1. Paragraphs 1 through 4 of Count I are incorporated by reference as if set forth at length herein.

2. Pursuant to the provisions of said Ordinance, the Defendant revoked Plaintiff's license to hold the concert scheduled or August 30 and 31, 1975, on the sole ground that a musical band known as "Blood, Sweat and Tears," would be a part of the program.

3. The Defendants have consistently maintained that their only reason for revoking the license granted to Plaintiffs was that the group called "Blood, Sweat and Tears" would play rock music.

4. Pursuant to Defendant's revocation of Plaintiffs' license, on August 29, 1975, Defendant Donnelly announced the cancellation of the concert scheduled for August 30 and 31, 1975 through the news media, including radio and television stations, newspapers and the AP and UPI wire services.

5. Said widely-publicized announcement discouraged substantial numbers of potential customers from attending the concert on August 30 and 31, 1975; although a court order permitting the concert was ultimately obtained, it was too late to repair the damage caused by aforesaid announcements.

6. Said revocation and announcement were intended to censor Plaintiff's concert solely on the basis of its content, in violation of plaintiffs' rights to freedom of expression and due process as secured to them by the First and Fourteenth Amendments to the Constitution of the United States, and constituted an unconstitutional application of said Ordinance.

7. As a direct result of Defendants' violation of Plaintiff's First and Fourteenth Amendment rights as aforesaid, Plaintiffs sustained severe financial losses, lost revenues and profits

from ticket sales, parking, refreshment and program book sales and other incidental revenue producing activities. In addition, Plaintiffs' reputations were damaged in the theatrical and musical community and among the concert-going public.

WHEREFORE, Plaintiffs demand judgment against Defendants in the amount of Two Hundred and Fifty Thousand and 00/100 Dollars ($250,000.00) in compensatory damages and One Million and 00/100 Dollars ($1,000,000.00) in punitive damages, plus interest and costs and attorney's fees as provided in 42 U.S.C. §1988.

COUNT III

1. Paragraphs 1 and 2 of Count I are hereby incorporated by reference as if set forth at length herein.

2. On August 22, 1975, Plaintiffs and Defendants entered into a contract regulating the manner in which Plaintiffs were to utilize said license and fixing the obligations of both parties for provision of services necessary for the concert to be held on August 30 and 31, 1975. (Said contract is annexed hereto as Exhibit A.)

3. Defendants breached said contract by revoking Plaintiffs' license for a reason other than that set forth in Paragraph 2 of the contract, which provides as follows:

> It is expressly agreed by the parties hereto that the entertainment license herein granted is held solely at the discretion of the City, and if at any time in the opinion of the City the interests of public safety demand, said entertainment license may be cancelled at any time by the City, and the City shall incur no liability to the Producer as a result of such cancellation.

4. Defendants breached said contract by failing to provide the services provided for in their contract with Plaintiffs and by interfering with the conduct of the concert in other ways.

5. In preparation for said concerts, Plaintiffs were at all times in full compliance with all material terms and conditions of said contract.

6. As a direct result of Defendants' breach of contract as aforesaid, Plaintiffs sustained severe financial losses, lost revenues and profits from ticket sales, parking, refreshment and program book sales and other incidental revenue producing activities. In addition, Plaintiffs' reputations were damaged in the theatrical and musical community and among the concert-going public.

WHEREFORE, Plaintiffs demand judgment against Defendants in the amount of Two Hundred and Fifty Thousand and 00/100 Dollars ($250,000.00) in compensatory damages and One Million and 00/100 ($1,000,000.00) in punitive damages, plus interest and costs and attorney's fees as provided in Pararaph 10 of their contract with Defendants.

COUNT IV

1. Paragraphs 1 and 2 of Count III are incorporated by reference as if set forth at length herein.

2. In reliance upon said license and contract, Plaintiffs entered into contracts with performers, sold tickets and arranged for all services necessary and incident to the concert.

3. Defendants' actions in revoking Plaintiffs' license, in announcing the cancellation of the concert, in failing to provide the services contracted for and in interfering with the conduct of the concert wrongfully interfered with Plaintiffs' contractual relations with performers, contractors, employees and ticket holders.

4. As a direct result of Defendants' interference with Plaintiff's contractual relations, Plaintiffs sustained severe financial losses, lost revenues and profits from ticket sales, parking, refreshment and program book sales and other incidental revenue producing activities. In addition Plaintiffs' reputations were damaged in the theatrical and musical community and among the concert-going public.

5. Defendants' actions as aforesaid were taken with malice and wanton disregard for Plaintiffs' rights.

WHEREFORE, Plaintiffs demand judgment against Defendants in the amount of Two Hundred and Fifty Thousand and 00/100 Dollars ($250,000.00) in compensatory damages and One Million and 00/100 Dollars ($1,000,000.00) in punitive damages, plus interest and costs.

COUNT V

1. Paragraphs 1 and 2 of Count IV are hereby incorporated as if set forth at length herein.

2. Defendants' actions in revoking Plaintiffs' license, in announcing the cancellation of the concert, in failing to provide the services contracted for and in interfering with the conduct of the concert wrongfully interfered with Plaintiffs' advantageous relations with potential purchasers of concert tickets and with performers, agents and promoters in the musical community.

3. As a direct result of Defendants' interference with Plaintiff's advantageous relations, Plaintiffs sustained severe financial losses, lost revenues and profits from ticket sales, parking, refreshment and program book sales and other incidental revenue producing activities. In addition, Plaintiffs' reputations were damaged in the theatrical and musical community and among the concert-going public.

4. Defendants' actions as aforesaid were taken with malice and wanton disregard for Plaintiffs' rights.

5. WHEREFORE, Plaintiffs demand judgment against Defendants in the amount of Two Hundred and Fifty Thousand and 00/100 Dollars ($250,000.00) in compensatory damages and One Million and 00/100 Dollars ($1,000,000.00) in punitive damages, plus interest and costs.

By their Attorneys,

s/ (Illegible)
Decof, Weinstein & Mandell
500 Howard Building
Providence, Rhode Island 02903

CONTRACT

THIS CONTRACT, executed in duplicate, entered into this 22nd day of August, A. D. 1975, by and between the CITY OF NEWPORT, a municipal corporation in the State of Rhode Island, hereinafter referred to as the "City," and FACT CONCERT, INC., a Rhode Island corporation, hereinafter referred to as the "Producer":

WITNESSETH:

1) That the City does hereby grant to the Producer an entertainment license for the dates of August 30 and 31, 1975, for the purpose of conducting a music concert at Fort Adams in the City of Newport.

2) It is expressly agreed by the parties hereto that the entertainment license herein granted is held solely at the discretion of the City, and if at any time in the opinion of the City the interests of public safety demand, said entertainment license may be cancelled at any time by the City, and the City shall incur no liability to the Producer as a result of such cancellation.

3) The Producer does hereby covenant and agree to pay to the City for the entertainment license and as a deposit to cover City expenses the sum of One Thousand ($1,000.00) Dollars by cash or certified check, upon the execution of this Contract, but no later than August 22, 1975.

The Producer also agrees to pay to the City all costs the City incurs for the providing of police and fire protection and any other City expenses incurred as the result of the Music Concert held at Fort Adams by the Producer. Said expenses shall be compiled by the Director of Public Safety and the net total of said expenses shall be paid by the Producer on or before August 22, 1975, in the full amount. Within five (5) days following August 31, 1975, the Director of Public Safety shall compile a final total of all expenses incurred by the City, and if said total is greater than the total paid by the Producer, the balance shall be paid by the Producer immediately if the final total is less than the amount paid by the Producer then the dif-

ference shall be rebated to the Producer.

In the event the concert license is cancelled for any reason, then the Director of Public Safety shall determine what rebate, if any, shall be returned to the Producer because of said cancellation.

4) It is expressly understood and agreed by the parties hereto that all expenses attributed to the music concert shall be paid directly by the Producer, other than police protection and other municipal services outside the confines of Fort Adams. Included as direct expenses of the Producer shall be all electrical charges, charges for toilet facilities, telephone charges, water charges and any and all charges arising from the operation of the music concert at Fort Adams on the date aforesaid.

5) It is agreed by the Producer that the maximum capacity of Fort Adams at the performance given by him under this Contract shall be no more than seven (7) thousand persons and the Producer agrees not to sell any tickets in excess of seven (7) thousand for the performance of this Contract.

6) The Producer further agrees that the performances given under the authority of this Contract shall terminate before sunset on August 30 and August 31, 1975.

7) The Producer agrees to comply with all orders of the Director of Public Safety with reference to fire and police protection and safety including, but not limited to, the following:

a) Auxiliary generator for lighting
b) Firefighters for fire protection and first aid duties.
c) Portable fire fighting equipment, stage area
d) Seating to be arranged so that aisles point near exits off the field as well as possible—all chairs to be wired together. Exits and entrances shall be provided as directed.
e) All seats to be installed and ready for occupancy no later than 3:00 P.M. on August 29, 1975.

8) The Producer agrees that he will not allow the sale of any alcoholic beverage other than beer at Fort Adams and that all concession stands will have signs indicating no beer will be sold to any person under 18 and the sale of beer shall be limited to two (2) glasses per person at one time. All beer and any other beverage shall be sold in paper cups only.

9) The Producer further agrees to comply with all rules, regulations and orders of the Director of Public Safety of the City concerning the public welfare within or without Fort Adams, which rules, regulations and orders shall be binding on the part of the Producer and promptly complied with.

10) In the event it becomes necessary to file legal action to enforce any provision of this Contract, the parties hereto agree that the prevailing party shall be entitled to recover as part of the costs of such action, all reasonable attorney's fees.

IN WITNESS WHEREOF, the City has caused this Contract to be signed and its corporate seal to be hereto affixed by Humphrey J. Donnelly, III, its Mayor, duly authorized by vote of the City Council, and FACT CONCERT, INC., has hereunto set its hand and seal by its President, Frank H. Amado, on the day first above-written.

In presence of:

s/ Mary C. Murphy

CITY OF NEWPORT

By: s/ Humphrey J. Donnelly, III
Mayor

FACT CONCERT, INC.

s/ (Illegible)

By: s/ Frank H. Amado
President

APPROVED:

s/ Frederick W. Faerber, Jr.
Assistant City Solicitor

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

ANSWER TO AMENDED COMPLAINT

PARTIES

1. Defendants admit the allegations relating to Fact Concerts, Inc.

2. The Plaintiff Lerman is unknown to said Defendants and the Defendants are, therefore, without sufficient knowledge to form a belief as to the matters stated with respect to him and leave the Plaintiffs to the proof thereof.

3. Defendants admit the allegations of paragraph 3, 4 and 5, but deny that the Defendant Robert O. Beattie is presently a citizen of the State of Rhode Island.

COUNT I

1. Defendants deny that on or about August 22, 1975, Plaintiffs sought and were granted a license by Defendant City of Newport, acting by and through its agent, Defendant Donnelly, to hold a concert on August 30 and 31, 1975, in the City of Newport; they further deny that Plaintiff Lerman at any time sought and was granted a license by said Defendant City, or any person or persons acting in its behalf.

Defendants admit that on or about August 22, 1975, a contract relating to such license was entered into by the Defendant City of Newport and the Plaintiff, Fact Concerts, Inc., to which contract the Plaintiff Lerman was not a party. A copy of said contract is attached to Plaintiffs' Amended Complaint and made a part thereof.

2. Defendants admit that a license was granted pursuant to Section 19-7 of the Newport City Code, and that said ordinance is properly quoted.

3. Defendants admit the allegations of paragraph 3, but deny that the same has any relevance to the matters in issue before this Honorable Court.

4. Defendants deny the allegations of paragraphs 4, 5 and 6.

5. Defendants are without sufficient knowledge to form a belief as to the matters stated in paragraph 7, assert that the allegations thereof are speculative, and unrelated to the Plaintiffs' asserted claims for damages in subsequent Counts of their Amended Complaint.

FURTHER, Plaintiffs are not entitled to the injunctive relief sought since they fail to set forth any claim of impending injury, loss or irreparable damage. In addition, in Plaintiffs' prayer for injunctive relief, the Defendants are unable to fully answer the same since said prayer appears to be incomplete and therefore incoherent.

COUNT II

1. Defendants reaffirm their answers to pararaphs 1 through 4 of Count I, which answers are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. Defendants deny the allegations of paragraphs 2, 3, 4, 5, 6 and 7 of said Count II. Further, with respect to said paragraph 7, Defendants particularly deny that damage to Plaintiffs' alleged reputations is a proper subject of relief under any of the Civil Rights Acts, so-called, or the First and Fourteenth Amendments to the Constitution of the United States.

COUNT III

1. Defendants reaffirm their answers to paragraphs 1 and 2 of Count I, which answers are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. Defendants admit the allegations of paragraph 2 of said Count III to the extent that they relate to Plaintiff Fact Concerts, Inc.; they deny said allegations insofar as they relate to Plaintiff Lerman.

3. Defendants deny the allegations of paragraphs 3, 4, 5 and 6 of said Count III and, in addition, reaffirm their position as to the impropriety of alleged damage to the Plaintiffs' reputations as proper subject matter of the instant action asserted in said paragraph 6.

COUNT IV

1. Defendants reaffirm their answers to paragraphs 1 through 3 of Count III, which answers are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. Defendants are without sufficient knowledge to form a belief as to any contracts alleged to have been entered into with performers, and leave Plaintiffs to the proof thereof; Defendants admit that Plaintiffs sold tickets as alleged and, otherwise, deny all further allegations of paragraph 2 of Count IV.

3. Defendants deny the allegations of paragraphs 3, 4 and 5 of said Count IV, and particularly reaffirm their position as to the impropriety of alleged damage to the Plaintiffs' reputations as proper subject matter of the instant action, which damages to reputations are asserted in paragraph 4 of said Count IV.

COUNT V

1. Defendants reaffirm their answers to paragraphs 1 and 2 of Count IV, which answers are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. Defendants deny the allegations of paragraphs 2, 3 and 4, and particularly reaffirm their position as to the impropriety of alleged damage to the Plaintiffs' reputations as proper subject matter of the instant action, which damages to reputations are asserted in paragraph 3 of said Count V.

SECOND DEFENSE

The Amended Complaint fails to set forth a cause of action upon which relief may be granted.

THIRD DEFENSE

At all times referred to in each Count of said Amended Complaint, the Defendants, jointly and severally, acted in good faith, and thereby enjoy immunity herein.

WHEREFORE, Defendants demand judgment against said Plaintiffs, jointly and severally, together with fees and costs incurred in the defense hereof and such other relief as this Honorable Court may deem meet, just and proper.

By their Attorneys,

s/ JAMES S. O'BRIEN
JAMES S. O'BRIEN
City Solicitor

s/ FREDERICK W. FAERBER, JR.
FREDERICK W. FAERBER, JR.
Assistant City Solicitor
City Hall
Newport, R.I. 02840
Telephone: (401) 846-9600

December 11, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

STENOGRAPHIC TRANSCRIPT OF TRIAL

* * *

[DONNELLY, *Direct*, Begins, Tr. Vol. II, p. 207]

[II208] Q. Are you the Mayor of the City of Newport? A. I am.

Q. How long have you been the Mayor? A. Since 1971.

Q. And prior to that were you on the City Council of the City of Newport? A. Yes, I've been on the City Council since 1969, Chairman 1972, Chairman and Mayor.

Q. How many people are on the City Council of Newport? A. Seven.

Q. That's including yourself? A. Including myself.

Q. So there are six besides you? A. That's right.

Q. Is that the way it has been since you were first on there, since 1969? A. Yes.

Q. Now do you get to be elected Mayor of the City of Newport? A. You first run for City Council. The City has seven Council members divided into four wards. There's one councilman for each of the four wards, then there are three who are elected by the city at large. You have to be an at-large councilman to be the mayor so you have to run, get elected to the Council at large and then you have to get four votes of the City...

* * *

[II227] Q. You don't remember? A. No.

Q. Before this meeting was called on the 26th of August had you knowledge that Blood, Sweat and Tears was supposed to be on the program? A. Again it's really difficult with the date and—

Q. Well, without fastening on the date, this was quite a group that, this was quite a controversy boiling in Newport all week about this jazz concert? A. Yes, there was.

Q. It's something that made a big impression on the papers, I'm sure that it concerned you, didn't it, politically? A. That's true.

Q. You know that there were two meetings held that week, one on Tuesday and one on Friday, all right, so I'm trying to find out if anything sticks out in your mind about this momentous series of events. Without reference to dates the first meeting, the Tuesday meeting, when you went into that Tuesday meeting did you know anything about Blood, Sweat and Tears? A. I honestly don't remember. You're trying, I want to be as honest as I can, I'm honestly trying to be, I just don't remember specifically. I know that there was much concern, I [II228] know that Blood, Sweat and tears was brought in to replace, I think it was Sarah Vaughn, and that the Council had concern as I had concern over public safety because of previous events that had happened and perhaps larger crowds being attracted by a group such as Blood, Sweat and Tears than we felt we could handle or we wanted to have in the community at that time.

Q. You're saying this now in retrospect, Mayor, is that correct? I'm asking you how this meeting got called, who expressed concern, what you knew about the Blood, Sweat and Tears problem before you went into this meeting, can you tell me anything about that? A. Not specifically.

Q. Generally? A. Generally I stated it.

Q. Did you know about these problems before you went in to the meeting, the problem you talked about with Blood, Sweat and Tears, the traffic problem? A. Yes, I knew and we were concerned at the time that something, that only a jazz festival would be proper and that the performers would be jazz performers because the trouble that was had in the past in 1971 and the jazz festival, when performers got up and did not

perform jazz, they performed other than jazz and it incited the crowd and the riots followed.

* * *

[II235] Q. And no evidenciary hearing took place? A. No, sir, that's correct.

Q. Now can you recall for me, sir, whether you had any meeting between Tuesday, the 26th of August, and Friday, the 29th of August, concerning the jazz festival? A. I don't recall meeting specifically but I'm sure there was conversations.

Q. Well, getting down to, you say you had a conversation, was that with other Council members of the City Council? A. Yes.

Q. Can you tell me any, give me any date or approximate date? A. No, sir.

Q. Or approximate times? A. No, sir.

Q. Can you tell me the names of the persons who have been together with you at these conversations? A. No, I don't remember whether we were together as a group or just one or two or whatever, I don't remember. I do remember our City Solicitor telling us we would be subject to suit or we were threatened with a suit and being concerned about that.

Q. Do you remember the City Solicitor telling you that you didn't have the right to approve or disapprove of who played on the [II236] program? A. I don't remember it specifically but I would say that he did because I was under the impression that we had the right to say who would be on the program.

Q. And he told you that you didn't have that right, the contract was signed and did not provide for that? A. That's right.

Q. So you can't recall for me any meeting or conversations that took place during that week? A. That's right.

Q. Can you recall any meeting with Mr. Amado or Mr. Lerman or any of Fact Concerts? A. I don't recall.

Q. You don't recall anything that happened? A. No,

again it's difficult for me to say that I talked with him on a certain day and a certain hour and whatever he said.

Q. I'm not asking you that, Mayor, I want to know if you had any meetings? A. At which time?

Q. During this week when all of this excitement was going on. A. I don't recall. I think Mr. O'Brien was in contact with him.

Q. So you don't remember? A. Right.

* * *

[II331] MR. FAERBER: Thank you, sir, no further questions.

(Witness excused.)

THE COURT: Can you tell me how many more witnesses you have?

MR. DECOF: May we go to the side bar, Your Honor.

(Colloquy at side bar between Court and counsel)

MR. DECOF: Judge, before we get into the next witness I want to make known my intention to the Court with reference to the area I intend to go into so the Court has some advance notice of this. One of the areas I want to get into with this witness is that while he was a member of the City Council the City Council had been restrained by order of this Court in a previous case from impinging upon the right of free speech. the basis of my going into it is to show prior knowledge and deliberate indifference; prior knowledge, indifference, prior knowledge concerning the right of free speech.

THE COURT: Well, you're thinking of that aspect of the civil rights law wherein the constitutional principle is so well established that it may eliminate a possible good faith defense.

MR. DECOF: Right, the right of free speech is so well established that you don't have to know that he was previously restrained.

MR. FAERBER: I think Mr. Decof is referring to the [II332] Tiger Cage, the American Society of Friends and Volunteers, something like that.

THE COURT: I remember that case.

MR. DECOF: It was a question of a display on Washington Square. This goes again even to this, even if they took the position that, well, you know, we didn't know it, this right of free speech involved here, there is no civil rights law, this is an element that could go to it.

THE COURT: I'm not too sure they are entitled to a good faith defense on the record as it now stands, I haven't decided as yet.

MR. DECOF: This is an intentional act.

THE COURT: You see, what bothers me here, the same thing that bothered me with reference to when Mr. Faerber was questioning about what happened in 1971 at a rock concert, that is, undue prejudice in a type of thing like this. I think he could be questioned, does he know of the right of free speech, has he known about it, you know that type of an examination, then if he should say no, he doesn't know, he wasn't aware, then of course now the picture changes as to the right to impeach him. I'm afraid I couldn't allow it at this point, I think it would be, I know I can't allow it, I think it would create the impression with this jury that the City Council just arbitrarily knocks off all these things and are willing...

* * *

[WEST, *Direct* Begins Tr. Vol. II p. 476]

VOLUME III

[III30] MR. DECOF: Objection.

THE COURT: Sustained.

Q. What was that disturbance? A. As I stated just a moment ago, people—

MR. DECOF: If the Court please, excuse me, it's already asked and answered, I see no point in going over the same thing twice, three times, four and five.

THE COURT: That's fair enough comment. I will allow this one more time.

A. Mr. Faerber, as I stated, there were minor disturbances that were caused by the numbers of people outside who couldn't get inside, couldn't purchase a ticket and just wanted admission, so they decided to make admission for themselves. Same problem in 1971, I mean, just of greater magnitude. It was a very minor magnitude in 1969 as compared to '71, obviously.

Q. Were you associated with the '71 festival? A. Oh, yes.

Q. And was this also at Festival Field? A. Yes, it was.

Q. What happened at that time? A. As I stated in previous testimony 35,000 came to the event, [III31] which could handle 12,000, and I don't have to say much more, it's all a matter of public record. It was a disaster, it was a full-scale riot with bodily injury to hundreds and hundreds and subsequently canceled by the council, the Police Department and canceled forever.

MR. DECOF: I move to strike the latter part of that, your Honor.

THE COURT: Yes, the latter part is stricken.

Q. So there were, you have expressed minor disturbances in 1969 and a greater disturbance in 1971? A. I was there in 1960, too.

Q. What about 1960? A. Well, that was the first full-scale riot.

MR.DECOF: Objection, if the Court please. We're talking of '75, this is fifteen years ago.

THE COURT: I think you've gone as far as you can go.

Q. Now, having in mind the events of 1969 and 1971, were those factors which you considered at the August 26 meeting in 1975?

MR. DECOF: Objection, if the Court please.

THE COURT: Overruled.

A. Yes, they prejudiced my mind greatly.

Q. In what sense did they prejudice your mind? A. The safety of the people of the community of Newport.

• • •

[WEST, *Cross* Begins Tr. Vol. III p. 37]

* * *

[III40] XQ. And the city refused to allow that to happen? A. We refused to grant them a license, sir.

XQ. And they went to the Federal Court, to this very Federal Court, is that right? A. Yes, they did.

XQ. And before this very Chief Judge, Judge Pettine, isn't that right, sir? A. Yes.

XQ. And he issued a restraining order, an injunction restraining the City of Newport and you, as a member of the City Council from interfering with the right of these people to exercise free speech in the form of demonstration, isn't that right, sir? A. Slightly incorrect, he refused the rights of us not to grant them a license, which is a little bit different as far as I was concerned. They had applied for a license, we refused it, and Judge Pettine refused to allow us to refuse a license.

XQ. More precisely what happened is, in other words, he enjoined you people from refusing a license? A. Well, that's his opinion, sir, you can't hold me accountable for the Judge's opinions.

XQ. As a matter of fact, you don't have much respect for the Judge's opinion, do you, sir? A. About as much as you have.

* * *

[CRISTINE, *Cross* Begins Tr. Vol. III p. 98]

[III100] XQ. Notwithstanding the two problems you talked about with the chairs and the generator, isn't that correct, sir? A. I believe that is correct.

XQ. There was nothing in the new affidavit, new contract, which was going to say you had better wire up the chairs instead of taping, nothing was talked about that? A. No, except you must realize that the chairs really did not become an issue until the last minute, so we couldn't have really made that a prerequisite.

XQ. I'm going to ask about the chairs. They didn't become an issue until the last minute, did they, sir? A. That's correct.

XQ. And by the way, did you ever go out to inspect the premises at Fort Adams before the festival? A. I did not.

XQ. You did not—did you attend the festival, by the way? A. I did not.

XQ. So anything you know about the chairs or the generator was what Mr. Perry told you? A. That's correct.

XQ. Is that right? A. Right.

XQ. By the way, sir, were you on the City Council in this case involving the tiger cage came up? A. I was.

[III101] XQ. Do you know when that was? A. I don't remember the exact date, no.

XQ. Do you remember the year? A. I believe it was the same year we are talking about.

XQ. The same year? A. I'm not positive, but I believe it was.

XQ. But it happened before the Jazz Festival? A. I believe that's correct, but, I mean, I'm not positive of that, though. I rather would really stay away from that, though, because my memory isn't that fresh.

XQ. Your best recollection, I'm not holding you to it, it was sometime in the same year? A. I think so, yes.

XQ. You told us that—by the way, before I get into that, do you recall whether or not every year the United States Navy Band would perform a band concert in Eisenhower Square, Eisenhower Park?

MR. FAERBER: I object, your Honor. I don't see the relevancy.

THE COURT: He may answer the question does he recall. Overruled.

XQ. Do you recall, sir, whether the United States Navy used to give a band concert in Eisenhower Park every year? A. I have honestly a reservation about answering that.

When you say "every year," I believe there were years when they played, whether they played every year or not, I'm not sure.

* * *

[CARR, *Direct Begins* Tr. Vol. III p. 107]

. . .[III661] at that time, and when he comes in here and all of a sudden a meeting is called on the 26th, and there's going to be a change in the original program, they were going to allow, we were bending over backwards for Mr. Amato, we weren't trying to hurt Mr. Amato, and when he comes in with a new change, and we told him we didn't want any rock, we told him that when we originally dealt with him, and he, being a Newporter, a Newport businessman, he had said he realized what the Council wanted, and he would do everything he could to go by what we wished if we grant the license, and I'm saying in good faith, we had all of these things, we didn't try to hurt Mr. Amato or anybody. We went along, and we signed the contract, we changed the dates for Mr. Amato, and we had a special meeting, as you know, where Blood, Sweat and Tears came up. There was concern, concern arose because of this late date about what we, I'm talking about for myself, I knew nothing about Blood, Sweat and Tears, I'm not a music buff or music lover, but here I am, I'm placed in the position where I think we're all trying to stress that we are sitting here trying to make decisions that are best in foreseeing the future. You don't want anything to happen. We all live in Newport. I've been there all my life, and they have these problems at the festivals. We had been through the problem the year before in '74 with Mr. Russo, who we gave a license to, that I voted against down in Cardine's Field [III112] in the City. We had all kinds of problems and here we're getting into it once again, and you're trying to see the same thing doesn't happen, you're trying to protect the citizens. I have my constituents, and I'm trying to think of the people and a concert like that, and I

mean, this last minute change and so on. I just couldn't, in my heart and in my mind, vote in favor of letting Blood, Sweat and Tears go on unless they could guarantee, and we made them an offer, whether written or verbal, if they would say that Blood, Sweat and Tears would not play rock the concert could go on. I mean, because it was, we were afraid that if rock were played and so forth and so on, that the crowd would be stirred up and then trouble would arise. That's what we have to look into, is the contract being fulfilled, I mean, because you're trying to eliminate anybody being injured and this is the whole basis for my reason that I voted against him. I mean, we went along with him, we gave him all the time, we offered if he would guarantee that they'd play no rock we would let them go on.

THE COURT: Mr. Faerber, you know, I think a conference would have made possible the giving of the testimony in a smoother fashion. I gather from all the man has said, he was concerned about the public's welfare, the citizens of Newport, I have to read into what he's saying that he was afraid that rock music was going to create problems.

* * *

[III129] MR. DECOF: No further questions, your Honor.

(Witness excused)

JAMES F. RING, having been first duly sworn, testified as follows:

Direct Examination by Mr. Faerber

Q. (By Mr. Faerber) Sir, what is your full name? A. James F. Ring.

Q. Where do you reside? A. 8 Cliff Terrace, Newport, Rhode Island.

Q. How long have you resided in Newport? A. All my life, with the exception of three and a half years in the Navy during World War II and six years in San Diego from 1960 to 1966.

Q. What is your present occupation? A. I'm retired from federal service.

Q. Now, during what period did you serve on the City Council? A. From November 1, 1971 through November 1, 1975.

Q. So you were there on the Council in August of 1975? A. Yes, sir.

Q. Sir, do you recall a special meeting of August 26, 1975? A. Yes, I do.

Q. Do you recall what transpired at that meeting? A. I believe the major issue was the substitution of one act for another.

[III130] Q. Did that cause you concern? A. Not initially, sir, because the act that was substituted was Blood, Sweat and Tears, and I didn't have any background on Blood, Sweat and Tears.

Q. Do you recall who was present at that Council meeting? A. All of the Council. I recall Mr. Perry, Mr. O'Brien and the City Clerk.

Q. Now, you say not initially you were not concerned because you had no knowledge of who Blood, Sweat and Tears was. Did anything arise in that meeting of August 26th that gave you any concern? A. There was some discussion between those present councilmen and others that a rock group or outfit with the wrong background had been substituted and that was of concern to the Council. It was of concern to me because we had initially been informed there would be no rock music present.

Q. Why was it of concern to you other than the fact that you made the original statement that you referred to here? A. I'm sorry.

Q. Why was it of concern to you other than the fact that it was a new outfit? A. The fact that there might be a rock group being substituted.

Q. Yes, and why was that of concern to you? A. Because we had had previous problems in the City of Newport not only at jazz festivals per se, but previous crowds that [III131] had been there, the type of people that were attracted by rock groups.

Q. Now, referring to the meeting of August 29 were you present at that meeting? A. Yes, sir.

Q. And were you present when Mr. Perry rendered his report as to his observation of the site at Fort Adams? A. Yes, sir.

Q. What was your reaction to Mr. Perry's report? A. Well, I was concerned because the basic safety requirements of the contract, which were in that contract as a result of the expertise of the department heads, Police Chief, Fire Chief, based on previous experience that this particular type of thing should be in there as a requirement, and it was not, according to what was reported, it was not being followed, according to Mr. Perry.

Q. And for what purposes were those requirements inserted in the contract, if you know?

MR. DECOF: Objection.

THE COURT: You object, Mr. Decof?

MR. DECOF: Yes, your Honor. This is the same thing, we've had this question, and it just doesn't stop. The contract speaks for itself.

THE COURT: I made the ruling once, I made it twice, I'm making it a third time. I don't like to say this,

* * *

[NEWSOME, *Direct* Begins Tr. Vol. III p. 137]

[III139] Q. Now, did you, as an individual councilman have any concern about that substitution? A. Yes, I did.

Q. Why? A. Well, I had worked at the Jazz Festivals before when I was home in the summer from college, and I was also familiar somewhat with Blood, Sweat and Tears. In

fact, they had been a rock group, and consequently I also had many calls from constituents who had learned when it became public, expressing concern because of past circumstances, and my concern was that they would draw not only a different crowd, but a larger crowd than Sarah Vaughn, and consequently we would have problems. The problems had nothing to do with the amount at the festival. Our problems began outside the festival.

Q. When you speak of problems, what do you mean? A. Disturbances, whether it be Freebody Park, Festival Field, or elsewhere. Usually I find that the majority of people don't go to the festival, itself, they go to the festival because of the festivities outside the park.

Q. Now, do you recall, was Chief Sullivan at that meeting? A. I can't recall whether we spoke with him there, I don't remember if it was that meeting or the meeting on Friday, or somewhere in between, but we did have a report from him [III140] and other department heads.

Q. Now, moving along, were you present at the special meeting that was called on August 29th? A. Yes, sir.

Q. And do you recall the purpose for which that meeting was called? A. I think it was just a continuation of what we had been discussing in that any time we deal with anybody in the Council we try to bend over backwards to accommodate them, and I think that last meeting to my recollection was that we were hoping to come up with a solution to the problems that bothered the Council up to that point. When you say problems that bothered the Council, you mean problems between Fact Concerts and the insertion of rock?

A. There had been no rock prior to this, and, you know, it was just a matter of speculation if they had a change, or if they didn't have a change, everybody had an opinion on it, and at that point to me it wasn't what they played, I think it was the connotation of the name, you know, after recalling and listen-

ing to everything, it was the connotation of the name of the particular group, and it was my concern was not any one particular problem, I think the contract which you people discussed was the coupe de grace of the whole series of things which were mentioned before, which is the good faith, and the discussion with Mr. Amato, [III141] being a Newporter, and the insertion at the last minute of a new group and having worked at some of these festivals, I was concerned, you know, that what had happened in the past when a ringer was brought in, because of lagging sales at the last minute, the type of crowd that they would bring in. You see, I had had quite a few phone calls from constitutents which expressed the concern.

Q. Do you recall specifically what Mr. Perry reported to you?

THE COURT: What time period?

MR. FAERBER: I'm sorry. August 29, your Honor please.

MR. DECOF: Again, it's the same question that has been asked and ruled on by the Court.

MR. FAERBER: Let me withdraw the question, your Honor.

Q. Did you hear Mr. Perry's report? A. We met with him and discussed several times, like even prior to the meeting, at which you sit down and things are discussed, which there are no minutes of them, as has been brought up in testimony before, the minutes are very poor, in fact, up to that time no vote, no minutes were taken as to what councilmen voted for. It was just 5-0, 5-2, 5-5, there was no specifics as to who voted for what up to that point. That has since been rectified.

MR. DECOF: Your Honor, may I ask that the answer to "Did you hear Mr. Perry's report" be answered. He said,

* * *

[III143] A. Yes, I did.

Q. And did you vote in favor? A. Yes.

Q. When they subsequently applied for a change in dates to Labor Day weekend did you vote in favor of that? A. Yes, I did.

Q. And insofar as you, as a councilman are concerned, was the relationship between the City of Newport, you, Fact Concerts and Mr. Amato amicable through at least August 26? A. Yes, that's the main reason why I voted for it in spite of the problems that we've had in the past.

Q. Was the Council in a position of willingness to negotiate this matter further to the evening of August 29?

MR. DECOF: Objection, if the Court please.

THE COURT: Sustained.

MR. FAERBER: You may inquire.

Cross-Examination by Mr. Decof

XQ. (By Mr. Decof) Sir, to start off with, were you on the City Council when this tiger cage case took place? A. Yes, I was.

XQ. Do you remember when that was, sir? A. I don't remember the exact time, it had to be in '73 and '75, that's when I was on the Council.

XQ. You don't remember if it was '70, '75? A. No, I don't.

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

JURY CHARGE

Members of the Jury, it is now the duty of the Court to instruct you in the law applicable to this case which is about to be submitted to you. As I have already told you — you will apply that law to the facts of the case as you determine those facts.

You have heard the testimony of the witnesses and in your jury room you will have with you the exhibits that have been introduced in the course of this trial. Both sides have rested so that the entire case is before you insofar as it concerns the evidence — the evidence that you must consider.

The action you have just heard is referred to as a civil case, and under our practice in a civil case the [2] plaintiff files a complaint which sets forth the kind of action instituted by the plaintiff and outlines to the defendants the claim that is being made against them.

In this case the complaint alleges in Count I that the plaintiffs were denied certain constitutional rights. They claim that the defendants deprived them of their rights under the First and Fourteenth Amendments of the Constitution by revoking their license to hold concerts on August 30 and 31, 1975 at Fort Adams. The action is brought under the Civil Rights Act.

The Civil Rights Act is referred to as 42 U.S.C. §1983. It reads:

> "Section 1983 of Title 42 of U.S.C.A. provides that any inhabitant of this Federal District may seek redress in this Court, by way of damages, against any person or persons who, under color of any law, statute, ordinance, regulation, or custom, knowingly subject such inhabitant to the

deprivation of any rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States."

Ladies and gentlemen, this Act which I have just read to you was enacted by Congress under the Fourteenth Amendment to the Constitution. The Fourteenth Amendment provides:

"No State shall make or enforce any law which shall abridge the privileges [3] or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Members of the Jury, I could engage in a long, detailed explanation of the Civil Rights Act but I do not think it is necessary because your purposes can be accomplished through a general statement on the pertinent law which you must apply.

It all amounts to this — we have certain rights, privileges, and immunities which are secured to us and protected by the United States Constitution. One of these liberties, found in the First Amendment, is the protection of our right to freedom of speech and expression from arbitrary actions by government; in using the term "by government" I am also referring to cities and towns. The First Amendment protecting freedom of speech includes freedom of artistic expression, whether it be in books, pictures, paintings, plays, or concerts, and this right to freedom of artistic expression is entitled to the same serious consideration that you would give to a claim that a book or newspaper had been censored. As it pertains to this case, the right under the First Amendment of artistic expression also includes the right to hire groups or performers to appear at a concert. However, this right is not absolute. Town officials have the right to deny a license, provided such denial is [4] consistent with a legitimate interest in the health and safety of the citizens of its town; but this right does not permit a city or

town to deny a license because of the contents of a proposed show. Expressed differently, it is impermissible for a government to attempt to control the contents of expression. Now, in the exercise of the broad power they do have to protect the health and safety of the citizens, they cannot act arbitrarily; that is, they must act according to definite standards that are indeed related to the health and safety of the citizens.

In addition to what I have just told you, plaintiffs must also prove that the defendants were acting under "color of law." There is no dispute about this — the defendants do not deny that they were acting under color of law. However, I will explain what this means to help you better understand the Civil Rights law. As I said, those who violate these rights must be acting "under color of law." That is, the unlawful act must consist of an abuse or misuse of power which is possessed by the official simply because he is an official and the unlawful acts must be of such a nature and be committed under such circumstances that they would not have occurred but for the fact the person committing them was an official purporting to [5] exercise his official powers. Again, as to this point you need not concern yourselves. It is not disputed. That is, the defendants agree they were acting under color of law; they were acting in their official capacity in the performance of their official duties. So, in order to prove their claim, the burden is on the plaintiffs to establish by a preponderance of the evidence the following facts:

1) That the defendants acted arbitrarily in denying a license to the plaintiffs; that is, they were not motivated by a strong and legitimate concern for the health and safety of the citizens and did not act according to any standards that are indeed related to the health and safety of the citizens.

2) That the defendants were acting under color of law.

3) That the defendants' acts in denying the license deprived the plaintiffs of their First Amendment right to artistic expression or promotion of such expression.

4) That the defendants' acts and conduct were the proximate cause of damages to the plaintiffs.

Ladies and gentlemen of the Jury, you will note that the City of Newport is a defendant in this action. Under federal law a city is liable if it directly acts, through a course of action or policy set by the governing town officials, to deprive someone of their protected constitutional rights. Likewise, under state law, a city is to be treated similarly [6] to any other person who commits a tort. Therefore, if you find the City of Newport liable, you should treat it as you would any other individual defendant.

Ladies and gentlemen of the Jury, in this kind of action the defendants are responsible for the natural consequences of their actions. However, they are entitled to what is known as a "good faith" defense if their conduct was motivated by permissible intentions; that is, that they acted sincerely and with a belief that they were doing the right thing. However, an act violating a person's clearly estabished constitutional rights cannot be justified by ignorance or disregard of settled undisputable law on their part. The defendants must be held to a standard of conduct which is based not only on permissible intentions, but also on knowledge of the basic unquestioned constitutional rights of the plaintiffs. Putting it in another way, the defendants' subjective intentions do not invoke this defense of good faith if they knew or reasonably should have known that the action they took within the sphere of the official responsibility would violate the plaintiffs' clearly established constitutional rights. The First Amendment right of artistic expression is unquestionably a clearly established constitutional right.

Ladies and gentlemen of the Jury, as to this defense there is no question that the defendants intentionally denied a license to these plaintiffs. If you find that they knew or should have known the Plaintiffs' First Amendment rights would be violated by denying this license and you [7] find they did not deny this license to protect the health and safety of the citizens

of Newport, then, if the other four elements I have already given to you are satisfied, your verdict must be for the plaintiffs against the defendants. Putting it another way — if they knew or should have known the denial of the license implicated the plaintiffs' First Amendment rights but they honestly denied the license to protect the health and safety of the citizens of Newport, then they acted in good faith and your verdict on Count I must be for the defendants.

Finally, the defendants also claim the plaintiffs breached their contract. If you find there was a breach — i.e., that is the chairs and the generator were out of compliance and if you find that was the actual reason for denying the license, then your verdict must be for the defendants. However, if you find that contractual violations were only a pretext for denying the license, your verdict must be for the plaintiffs.

Count II of the complaint claims that the defendants wrongfully, intentionally and maliciously interferred with the contractual relationships that the plaintiffs had already arranged with other parties. Allegedly, the City officials accomplished this interference by making announcements through the public media including radio and television stations and [8] newspapers that the concert scheduled for August 30 and 31 had been cancelled and that the plaintiffs' license had been revoked. Plaintiffs contend that as a result of this they sustained financial losses from reduced ticket sales and incidental revenue-producing activities.

Members of the Jury, it is an actionable wrong to maliciously interfere with the contractual relations of another. This principle was established in the State of Rhode Island in the case of *Local Dairymen's Association, Inc.* v. *Potvin*, 54 R.I. 430, 433 (1934). In order for the plaintiffs to prevail on this count, first they must show the existence of an actual contract — in this case there is no dispute that the plaintiffs did indeed have a contract with performers for a concert on August 30 and 31. Secondly the plaintiffs must prove through

a preponderance of the evidence that the defendants acted knowingly and maliciously in the interference with the contract. Malicious means that the defendants acted intentionally without justification and with full knowledge that the plaintiffs had an existing contract and with the knowledge of the likely results of their intentional interference. And thirdly, that the damages the plaintiffs suffered were the direct and proximate result of the defendants' conduct.

[9] *Proximate Cause*

I will now instruct you as to proximate cause. Before the plaintifs can recover they must prove the injuries they suffered were proximately caused by the conduct of the defendants as they allege — that is that their injuries were either a direct result or a reasonably probable consequence of the complained of conduct — for if you find such injuries were caused otherwise then, of course, the defendants are not liable. Now members of the Jury, in addition to what I have just told you, there are certain fundamental principles which you must apply in arriving at your conclusion based upon the facts in the case. I instruct you that you are the sole judges of the facts in this case. Your judgment of the facts should be uninfluenced by the Court or counsel, except as you are bound to follow the law of the case as the Court gives it to you.

While you should not permit any invasion of your province to alone judge the facts, arguments of counsel are entitled to respectful consideration. Their arguments should be of considerable aid to you in marshalling the facts in your mind, but you alone are the sole judges of the facts.

[10] *Burden of Proof*

In your deliberation and in arriving at your verdict, you will bear in mind that in an action of this kind, the plaintiffs have the burden of establishing their case by a preponderance of the evidence.

In considering this case, you will examine all of the material evidence in order to determine its relevancy and the true state

of facts. You will weigh all of the evidence in the case so as to reconcile, if possible, such evidence as may be in conflict, and in considering and weighing the evidence, you should use the same judgment, reason, common sense, and general knowledge of men and affairs as you would in everyday life.

Preponderance of Evidence

In speaking of the burden of proof, I have referred to the requirement of preponderance of evidence. This is a term which you, no doubt, will understand. It has been defined as that evidence which, after a consideration of all of the evidence, is, in the judgment of the jury, entitled to a greater weight. Stated in another way, the phrase "preponderance of evidence" means that the evidence which points to a certain conclusion appears to the jury to be more credible and probable than the evidence to the contrary. It means such evidence as when weighed with that which opposes [11] it has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests. For example, you have all seen the lady of justice with the scales. If you consider the evidence as weights being placed on each side of the scale — one plaintiffs' and the other defendants' — in order for the plaintiffs to prevail, the weight of the evidence on their side must be such as to tip the scales perceptibly in their favor — as you see it. I trust you all understand that.

Credibility of Witnesses

In your consideration of this case, you must also take into account the credibility of witnesses, of which incidentally, you are also the sole judges. With that, the Court has nothing to do.

You may judge the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against any

of the parties, or any circumstance tending to shed light upon the truth or falsity of such testimony, and it is for you to say what weight you will give [12] to the testimony of any and all witnesses.

In viewing the evidence, members of the jury, you must not let prejudice or sympathy influence you in your verdict. You should be guided alone by the evidence and the law of the case as the court has given it to you. Members of the Jury, if you let prejudice or sympathy enter your deliberations, you will be striking a blow at the administration of justice which you and I are sworn to uphold.

Damages

I am now going to charge you on the law of damages. The fact that I am talking about damages does not indicate and should not be considered by you as any indication that I favor a verdict in favor of the plaintiffs. The court is neutral and is only interested in helping you find a just and true verdict under the believable evidence. What verdict you find is entirely in your hands. But since I cannot tell how you are going to decide this case and because it is within your province to find a verdict for the plaintiff, it is necessary that you know how to arrive at the amount of the verdict.

Now, as to damages — in this case you may consider awarding compensatory as well as punitive damages as I will [13] explain to you.

First, as to compensatory damages — the plaintiffs are entitled to compensation for all losses which they sustained and which they have established with reasonable certainty. They are entitled to compensation for all lost profits, including those lost on ticket sales, parking and food concessions, and program books. You may award damages (1) for lost profits, as I have just told you, if you find that the plaintiffs lost these profits as a direct result of the defendants' conduct, and (2) that the plaintiffs proved the fact that profits were lost and proved the amount of the lost profits with reasonable certainty, and (3)

that the plaintiffs were sufficiently experienced in the enterprises they were undertaking to assure profits, and (4) that the damages or lost profits could reasonably have been foreseen by the parties to this action at the time the contract was made.

Punitive Damages

Now, members of the Jury, you must also consider whether or not you should make an award of punitive damages.

"In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, [14] in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or omission of the defendant, which proximately caused actual injury or damage to the plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may if in the exercise of discretion they unanimously choose to do so, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

An act or a failure to act is 'maliciously' done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is 'wantonly' done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is 'oppressively' done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary

harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

[15] Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the defendant's act or omission, which proximately caused actual damage to the plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case."

Now, in order for you to reach a decision in this case, ladies and gentlemen of the jury, it is necessary for you first to determine what are the facts; to determine from all of the evidence put before you which of the contentions of the adversary parties is the true contention. It is the function of the jury to consider the evidence introduced and to determine therefrom what are the facts. It is [16] the duty of the Court to decide questions of law and to instruct you in the law applicable to the case, but it is for you to apply that law to *the facts* of the case as you, the *jurors*, determine those *facts to be*. Therefore, the factual situation in this case, what actually happened, took

place or transpired in respect to the occurrence or transaction under consideration, this is to be determined by you and by you alone.

Now if during the course of the trial or in giving you these instructions the Court has said or done anything or may say or do anything which indicates to you that the Court is expressing an opinion as to what the facts in this case are, I charge you specifically that the Court has not intended and will not intend to indicate any such opinion. You should not permit such words or acts, if any, to have any influence whatever on your determination, as to what the facts are.

It is understood, however, that in determining what the facts in this case are, you are to consider only that evidence which has been properly placed before you. It is the duty of the Court during the course of the trial to pass upon the admissibility of offered evidence, to decide whether or not offered evidence should be considered by you. Such [17] evidence as the Court admits is properly before you for your consideration. Such evidence as the Court has refused to admit is not a proper subject for deliberations and should not be given consideration by you. By the same token, you have heard it also does not constitute a proper subject for your deliberations and should be ignored and disregarded by you as though you had never heard it at all.

Papers, documents and charts admitted into evidence by the Court are a part of the evidence properly before you and will be available to you in the jury room for consideration during the course of your deliberations. These exhibits are as much a part of the evidence before you as the testimony which you heard from the stand, and you will give each exhibit such weight as in your considered judgment in the entire context of all the facts proven at the trial it deserves.

Now, I have told you this, and I repeat it, remarks or statements made by counsel in your presence during the course of the trial or in argument are not evidence and should not be

considered as such by you during the course of your deliberations. From time to time counsel in arguing to the Court, in arguing to you in final summation may purport to recall what the testimony has been either generally or [18] specifically. I am sure that in this case counsel here would not attempt deliberately to mislead you.

From what I have said I do not and did not mean to imply that you should approach your consideration of this case in an intellectual vacuum. You are not required to put aside or to disregard your experiences and observations in the ordinary, everyday affairs of life; they are essential to your exercise of reasonably sound judgment and discretion in the course of your deliberations; and it is your right and duty to consider the evidence in the light of such experience and observations. It is for this reason that you are required to be at least eighteen years of age before being allowed to serve as a juror in the hope that you will bring into court with you the maturity of experience and God-given common sense, and it is hoped and anticipated that you will sift all of the evidence in this case through that maturity and common sense.

Now, it is required in order for you to return a verdict that your decision be the unanimous decision of all six. You cannot return a verdict either for the plaintiffs or for the defendants unless and until you are in unanimous agreement as to what your verdict shall be.

[19] Therefore, in the course of your deliberations and in your consideration of the evidence you should exercise reasonable and intelligent judgment. It is not required that you yield your conviction simply because a majority holds to the contrary view, but in pursuing your deliberations you should keep your minds reasonably open to conviction with respect to the point in dispute so that you will not be precluded or prevented from achieving unanimous verdict by mere stubbornness. After all, courts and juries would not be worth very much to the community unless occasionally we decide

something. However, nevertheless, it is your right to maintain your conviction. Each vote of each juror is as important as the vote of any other juror, and you need not give up your conviction sincerely held simply because a majority hold to the contrary view.

It goes without saying, of course, that prejudice, sympathy or compassion should not be permitted to influence you in the course of your deliberations. All that either party here is entitled to, or for that matter expects, is a verdict based upon your fair, scrupulous, and conscientious examination of the evidence and an application thereto of the law as it has been given you by the Court. To yield either to sympathetic impulses or to considerations from [20] prejudice or bias would be to strike a blow at the very cornerstone of the system which you and I are sworn to uphold.

If in the course of your deliberations you should deem it necessary to be further instructed or assisted by the Court in any way, I would ask that you reduce such requests or questions as you may have to writing through your foreman. The foreman may then hand such written requests or questions to the officer in whose charge you will now be placed. The officer will then bring such written question or request to me and I will have you brought into the courtroom and will attempt to fulfill your request or answer the question, as the case may be. Other than the method outlined, please do not attempt to communicate privately or in any other way with the Court.

Now, as to damages — where several persons unite in the wrongful act, the extent of individual participation is immaterial for the question of liability. Each is equally liable, jointly or severally. 32 AmJur. 2d, P. 94-95 Sec. 29. You may return a verdict against any one or more of the defendants. In other words, you may find against all of the defendants, or against none of the defendants, or you may [21] find against one or more but less than all of the defendants.

In considering and reporting your award, if any, as to compensatory damages you will report one sum as against the defendant or defendants you might find liable. However, in considering and reporting punitive damages, should you do so, your award, if any, must be considered and reported as against each defendant individually. This is understandable because, as I have explained, punitive damages are based on the degree of culpability of the individual defendant. I further instruct you that as against any one defendant you may find him liable for compensatory damages but not punitive damages. By like token, as to other defendants you may find them liable for both compensatory and punitive damages.

EXHIBIT NO. 1

SPECIAL MEETING OF THE COUNCIL HELD AUGUST 26, 1975.

The CHAIRMAN called the meeting to order at 11:30 a.m. The CITY CLERK called the roll and the following members were present:

DONNELLY, Humphrey J., III	NEWSOME, Lawrence E.
CARR, Raymond H., Jr.	RING, James F.
BEATTIE, Robert O.	WEST, John H.
CORISTINE, Edward K.	

DISCUSSION RE:

ENTERTAINMENT LICENSE OF FACT CONCERT, INC.

MAYOR DONNELLY stated that the Council had just learned of the cancellation of Sarah Vaughan as a performer and the substitution of the group, Blood, Sweat and Tears, and the city does not condone rock festivals.

PHILIP WIENSTEIN, attorney for the concert group, stated they were not considered a rock group and had performed at Carnegie Hall and they were only consisting of 10% of the program, and they had a letter of approval from the Director of Natural Resources.

After a long discussion, pro and con, MAYOR DONNELLY moved that unless Blood, Sweat and Tears was removed from the bill on Sunday, the license for the contract would be cancelled by the City Council.
Seconded by COUNCILMAN CORISTINE and SO VOTED.

ADJOURNED 12:10 p.m.

s/ ROBERT A. SHEA
ROBERT A. SHEA
City Clerk

EXHIBIT NO. 2

SPECIAL MEETING OF THE COUNCIL HELD AUGUST 29, 1975.

The CHAIRMAN called the meeting to order at 4:28 p.m. The DEPUTY CITY CLERK called the roll and the following members were present:

DONNELLY, Humphrey J., III	NEWSOME, Lawrence E.
CARR, Raymond H., Jr.	RING, James F.
BEATTIE, Robert O.	WEST, John H.
CORISTINE, Edward K.	

ENTERTAINMENT LICENSE AND CONTRACT OF FACT CONCERT, INC.

MAYOR DONNELLY stated the special meeting was called to discuss a possible law suit if the Council did not allow Blood, Sweat and Tears to perform on Sunday's program, and that the Council had two alternatives, either to accept the City Solicitor's opinion to obtain an affidavit from Mr. Amado that no rock music would be allowed, or to cancel the concert altogether.

A discussion ensued between City Solicitor and Mr. Salier relative to a telephone conversation they had.

CITY SOLICITOR O'BRIEN suggested the Council allow Blood, Sweat and Tears to perform as long as they do not play rock music and if they draw a troublesome crowd, that all costs be born by Fact Concerts Inc. for extra policemen and in this way would be protected from suit.

COUNCILMAN CARR asked the City Manager if all sections of the contract had been fulfilled. by Fact Concerts Inc.

CITY MANAGER PERRY stated that he examined the site after 3:00 p.m. He was unable to observe the auxiliary generator and the wiring of the seats together was in progress and not completed by the deadline of the contract. The chairs were being put together with tape rather than wire.

Discussion by COUNCILMEN CARR, CORISTINE, NEWSOME, WEST, DONNELLY and CITY SOLICITOR relative to contract violations and why paragraph was left out of present contract giving Council right to approve what would appear on the program.

MAYOR DONNELLY stated that if Fact Concert, Inc. is in violation of the contract, the Council should cancel it and give Mr. Amado the opportunity to enter into a new contract.

Discussion by MR. AMADO, COUNCILMEN NEWSOME, CITY SOLICITOR, CITY MANAGER, COUNCILMAN CORISTINE relative to cancellation.

COUNCILMAN CARR moved to cancel the contract with Fact Concert, Inc. because they have not lived up to all phases of the contract. Seconded by COUNCILMAN CORISTINE.

Discussion by COUNCILMEN CORISTINE, WEST, NEWSOME and MAYOR DONNELLY.

MOTION ADOPTED. 7 in favor.

MAYOR DONNELLY moved to recess the meeting for one-half hour. Seconded by COUNCILMAN CORISTINE and SO VOTED.

RECESSED at 5:05 p.m.

RECONVENED at 6:25 p.m.

MAYOR DONNELLY moved to recess the meeting until 8:30 p.m. Seconded by COUNCILMAN CORISTINE and SO VOTED.

RECONVENED at 8:40 p.m.

MAYOR DONNELLY explained the meeting was recessed to give Fact Concert, Inc. the opportunity to discuss situation with its attorneys.

MR. WEINSTEIN discussed Fact Concert position, that they needed more time to contact other attorneys and backers, and if the Council stops the concert, suit will be instituted.

MAYOR DONNELLY stated the concert is cancelled because you did not live up to the contract.

Discussion by MAYOR DONNELLY, CITY SOLICITOR and MR. WEINSTEIN.

MR. WEINSTEIN asked they be allowed until 10:00 p.m. to make decision.

COUNCILMAN BEATTIE moved to give Fact Concert, Inc. until 9:30 p.m. out of courtesy. Seconded by COUNCILMAN CARR. SO VOTED.

RECESSED at 8:55 p.m.

RECONVENED at 9:27 p.m.

MR. WEINSTEIN thanked the Council for its time and the only remedy they have is to litigate the contract and he would see them in court.

MAYOR DONNELLY moved to adjourn. Seconded by COUNCILMAN CARR and SO VOTED.

ADJOURNED 9:28 p.m.

s/ JANE A. MCMANUS,
JANE A. MCMANUS,
Deputy City Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

DEFENDANTS' MOTION FOR JUDGMENT N.O.V. OR IN THE ALTERNATIVE FOR A NEW TRIAL

Now come the defendants and file this motion for judgment non obstante verdicto, or in the alternative for a new trial. The defendants move that the verdicts be set aside; that the judgments entered on the verdicts be vacated and set aside; and that an order be entered staying execution pending a further order of this Court. The defendants move for entry of judgments n.o.v. in accordance with the Federal Rules of Civil Procedure, particularly Rule 50 (b) and that judgment be entered in accordance with these motions as this Court may be determined as the jury verdicts and judgments entered thereon are contrary to the law and to the evidence and to the weight of the evidence.

This motion is entered in addition to the defendants' motion for a new trial heretofore filed on the grounds that the verdicts are against the law and the evidence and the weight thereof and that the verdicts are excessive and a result of passion and prejudice.

By their Attorneys,

s/ GUY J. WELLS
GUY J. WELLS
GUNNING, LAFAZIA & GNYS, INC.
410 Turks Head Building
Providence, Rhode Island

s/ FREDERICK W. FAERBER, JR.
City Hall
Newport, Rhode Island

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

REMITTITUR

Fact Concerts, Inc. and Marvin Lerman, the Plaintiffs in the above-entitled matter hereby accept the remittitur ordered by the Court on page 14 of the Opinion and Order dated July 2, 1979, thereby reducing that portion of the award of punitive damages rendered against the Defendant City of Newport from $200,000.00 to $75,000.00.

By their Attorneys,

s/ LEONARD DECOF
LEONARD DECOF
DECOF, WEINSTEIN & MANDELL
500 Howard Building
Providence, Rhode Island 02903